CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1828.

ADAMS vs. *LEWIS*,

Eastern Dist. *July*, 1828.

A privileged creditor has a right to a provisional seizure.

APPEAL from the court of the fourth district.

PORTER, J. delivered the opinion of the court. The plaintiff applied for and obtained a provisional seizure of cotton belonging to the defendant, on an authentic act, which contained the following clause: "To effect which payment of five thousand dollars, the crop now growing on said plantation is to remain pledged."

To the order granting this seizure, the defendant filed the following exceptions:

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1. That the copy of the writ served on the said Fran. R. Lewis, of provisional seizure, is not dated.
2. That the said writ of provisional seizure, issued improvidently by Nicholas Sburlati, signing himself deputy clerk; and because he has not that capacity.
3. That the affidavit of Christopher Adams, at the foot of the petition, is insufficient in not stating that the defendant would remove the property out of the state of Louisiana; or even that he would remove it out of the jurisdiction of the court: And again, said affidavit does not state the precise sum claimed by plaintiff.
4. That the petition contains no allegation shewing the necessity, or right of plaintiff, to seize provisionally, as has been done.
5. That the plaintiff's case does not come within the provision of the law providing for provisional seizure.

The court below overruled all these exceptions, except that which contests the right to obtain the seizure.

The judge *a quo* was of opinion that the provisional seizure accorded by the articles 284 and 285 of the code of practice, could

only embrace cases where the pledge was in the possession of the creditor.

If this be the true construction of the words *held in pledge, sert de gage*, the right given to the creditor to seize it *for the security of his claim*, was worse than a vain thing. For it being of the essence of a contract of pledge, that the object pawned should be delivered to the creditor, he has possession without seizure. And as the debtor has no right to take it from him without payment, the security of the creditor, if not weakened, would certainly not be strengthened by placing it in the hands of the sheriff.

But the code goes further (art. 284) and gives a right of seizure in all cases where the plaintiff has a privilege. The engagement entered into by the defendant, gave a privilege, although the object was not delivered. The expressions used in the contract, can be understood in no other way but as intending to confer a right of preference on the crop for payment. If they have not that meaning, they are without any; and it cannot be believed they were introduced for no purpose.

We therefore think the court erred in sustaining the exception, and we should reverse

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the judgment, were it not for a difficulty in regard to the objection taken to the authority of the deputy clerk. If the evidence which the judge states, in his opinion, he acted on was before us, we should affirm his judgment; but it is not, for there is no statement of facts. There being, therefore, no evidence in support of the clerk's appointment, the judgment of the district court must be affirmed with costs.

Porter for the plaintiff.

BOURGUIGNON vs. *BOUDOUSQUIE.*

Execution may issue on a judgment, which does not settle every claim of the parties.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This court directed that the plaintiff should recover the land claimed by him in his petition, and be put in possession of it, and ordered the cause to be remanded for an enquiry into the damages.

On presenting this decree to the district court, the plaintiff prayed to be put in possession, but the judge refused to do so; and to a mandamus calling on him to show cause why he did not, he has answered, "that the cause being sent back to fix the amount of damages,

the judgment of possession is in the nature of an interlocutory one; and altho' the plaintiff has called for two things in his petition, viz: possession and damages, there cannot be but one definitive judgment, which cannot be signed until there is a final judgment on the whole matter sued on."

It is true, as the judge *a quo* has stated, there cannot be a *final* judgment in the cause until all the matters at issue are definitively settled. But where these matters are susceptible of division, there is nothing in our law which prevents a court from dividing on one of them, and carrying that into effect where it is manifest that the judgment which remains cannot possibly produce a modification of that first rendered. A claim for land, and damages for detention, (the cause before us,) illustrates the rule as well as any other. The objection set up, on the ground that the party evicted has a right to be paid for his improvements before possession can be delivered, would be entitled to great weight; but we understand that no real plea was filed in the court below: consequently, the rights which might arise under it, are not presented for our decision now.

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The rule is therefore made absolute.

Ripley and *Conrad* for the plaintiffs—*Hennen* for the defendant.

SINGLETARY & AL. vs. SINGLETARY.

An executor who qualified in another state, and removes to this state the property of the estate, is suable in the district court

APPEAL from the court of the eighth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs sue their co-heir, who was executor of the common ancestor in South-Carolina, and has removed slaves and other property of the estate into this state, for an account of his administration, and the partition of the property in his hands, or the money due by him.

At the trial before the jury in the district court, the defendant moved the court not to proceed with the cause, or suffer any evidence to go to the jury, on the ground that the jurisdiction of the case belongs exclusively to the court of probates, and no other court can take cognizance of it.

The court was of that opinion—did not suffer any evidence to go to the jury—and charged them to find a verdict for the defen-

dant. They did so. He gave judgment of nonsuit, and the plaintiffs appealed.

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It is true, by the code of practice, courts of probates have the exclusive power to regulate all partitions of successions. *Art.* 924.

But the successions here spoken of, we understand to be successions which open here by the existence of property in the state, at the death of a man who dies in it or elsewhere: successions for the liquidation and settlement of which the authority of the state is called upon to act by the recognition of the executor, or the appointment of a curator.

But when, as in the present case, an executor, recognised in another state, under whose laws he acts, removes into this with the property entrusted to him, the heirs may call him to an account, and demand that he should empty his hands by a suit in the ordinary tribunals; and the court of probates of the parish, who did not authorise him to act, has no power to compel him to account before it. He never was an executor here, but one who has been executor elsewhere. The property which is claimed from him, was not the testator's, when it was brought into this state, but that of the heirs.

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It is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided and reversed; the verdict set aside, and the case remanded, with directions to the judge to proceed thereon according to law: And it is ordered that the appellee pay costs in this court.

Ripley & Conrad for the plaintiffs, *Hennen* for the defendant.

LOVE vs. DICKSON

In the 254 article of the code of practice, the word "garnishee" was, by a clerical error, employed for "defendant."

APPEAL from the court of the eighth district.

PORTER, J. delivered the opinion of the court. This action commenced by attachment. Various exceptions were taken to the regularity of the proceedings, all of which were overruled in the court below, and, in our opinion, correctly, except that which objected to the service of the citation.

The return of the sheriff states that he served it by leaving a copy at the late place of residence of the defendant, in this parish.

The 254th article of the code of practice requires that where the debtor *is a non-resident* of the state, service shall be made on the

door of the parish church, or that of the room where the court in which the suit is proceeding is held.

The petition in the case, stating that the defendant was a non-resident of the state, and the citation not being made in the manner directed by law, the whole proceedings in attachment must be set aside. In every case, a defect in citing the defendant is fatal, but particularly in those originating by attachment.

It has been contended, that the defendant's giving bond and taking the property out of the possession of the sheriff, cures the defect in the process; but it is a well settled rule that nothing cures defect in citation but appearance, and pleading to the merits.

The 254th article of the code of practice uses the words *garnishee* instead of defendant. In the French copy of the law, the expressions are *partie saisie*. It has been admitted on both sides, that by the words garnishee, the debtor is meant. This appears as well from what precedes as what follows the word *garnishee*, and from the nature of the enactments contained in the article. Any other construction would make the law completely without meaning. The mistake must have originated with

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the copyist or the printer. As in the 92[illegible] article it is provided that curators shall be appointed to such persons as are *capable* of administering their own property; where it is clear the word *incapable* was meant.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: and it is further ordered, that the attachment issued in the case be set aside; that the cause be remanded to the district court, to be proceeded in according to law; and that the appellee pay the costs of this appeal.

Ripley and *Conrad* for the appellee. *Hennen* for the appellant.

ABAT vs. *WHITMAN*.

The use of a common law denomination of a process does not necessarily introduce the English practice

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The only question in this cause is, whether a debtor who has been arrested on a writ of *capias ad satisfaciendum*, and discharged out of custody by the consent of the plaintiff, is not discharged of the debt; and

whether this discharge does not operate in favour of those who were bound jointly and severally with him.

By the laws in force in Louisiana antecedent to the change of government, no such consequence followed the discharge of a debtor from imprisonment. By the common law of England it did. No statute of the state, or the former territory of Orleans, has repealed in express terms the rules previously in force. If, therefore, our former law is repealed, it must be from the use of the words *capias ad satisfaciendum*, in the act of the legislative council.

The repeal of laws is never presumed; and if the new and old laws can stand together, they should be so construed. It would be going far, to hold that the special enactment of a remedy which previously existed, should introduce the consequences that attended that remedy in another system of jurisprudence. In this respect there is a meterial difference between this case and that construction which should be given to our laws introducing *jury trial*, and the writ of *habeas corpus*; for they being unknown to our jurisprudence, the understanding of them was *ex necessitate*, to be

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sought somewhere else. The use of common law terms is easily accounted for, in the desire of the legislature to use those words which would convey in the most clear and concise manner, to persons acquainted with the English language alone, the remedies defined. And tho' the terms *capias ad satisfaciendum* is not English, yet it is well known that the countries where the common law prevails, its meaning is as well understood as any word of their vernacular tongue which is used in law proceedings. So early as the year 1813, this court said that common law terms ought to be considered rather as a translation of the names formerly used than as emanating from the English jurisprudence. That their adoption as words can by no rule of law be considered as having introduced the English practice. 3 *Mart.* 185.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; that the cause be remanded, to be proceeded in according to law; and that the appellee pay the costs of the appeal.

Seghers for the plaintiff—*Eustis* for the defendant.

LANDRY & AL. vs. PEYTAVIN & AL.

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The state cannot claim the penalty stipulated, in case a building is not completed in a given day, if the warrants on the treasury, given to the contractor, be not paid, and he is thereby disabled from procuring materials and workmen.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The defendants (contractors for building a state-house at Donaldsonville, and his surety) resist the demand of the commissioners for the sum of $20,000, the penalty stipulated in the contract, in case the work was not completed within eighteen months, on several grounds; the principal of which is, that the progress of the work was arrested by the failure of the state in paying most of the warrants furnished him by the commissioners. There was a verdict and judgment against him. He made a vain attempt to obtain a new trial, and appealed.

The contract was signed on the 15th of June, 1825. It stipulated the work should be finished in eighteen months, which expired on the 15th December, 1826; and the present suit was instituted on the 26th of April following—a little more than four months after the period fixed for the completion of the work.

The price was $26,500, payable partly in advance, partly as the work progressed, and the balance at its completion; a very trifling

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part, (about $900,) in cash, the rest in warrants on the treasury.

The plaintiffs proved payments, in cash and warrants, to the amount of $20,250: the balance, $6250 not being payable till the completion of the work.

Colomb, a witness for the plaintiffs, deposed that the work was commenced on a part of the lot on which it stands. In April last, on the inception of the suit, the work was nearly half finished. It was not completed at the time of the trial.

On his cross-examination, this witness, who is the architect, deposed that, previous to the month of April, he furnished his certificate to the contractor, that the work was nearly (environ) half finished. He cannot say exactly what was the height of the building, when the site of it was changed.

Combs, a witness for the plaintiffs, deposed that the work was not complete, according to contract, at the time of trial.

Leon, a witness for the defendants, deposed that, when the site of the building was changed, the walls were about fourteen or fifteen bricks in height. The contractor has about 115,000 bricks ready, which will suffice to complete the building. Some lime is wanting.

The mason's work to be done is worth from $500 to $600. He thinks the building could have been finished in 18 months, had the materials been on the spot. He was employed by the contractor, and would have completed the work in time if the materials could have been furnished.

Randall, one of the commissioners, who did not join in the suit, and was examined by the defendants, deposed that the site of the building was changed at the suggestion of the commissioners, who found that a gulley was running thro' a part of the foundation. There was no allowance made to the contractor for the change: he did not demand one.

Canot, deposed he has seen the timber the contractor has ready for the building, but cannot say whether it will suffice.

Comes, deposed that he believes the timber sufficient.

The treasurer of the state, examined by the defendants, deposed that, towards the latter part of June, 1827, he replied to the enquiry of the contractor, whether one of the warrants of the commissioners would be paid, that it would not, as it had been deposited in the Louisiana state bank; and because the attorney-general

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had advised payment should be withheld, as the contractor was sued. The deponent, having asked whether he would pay the other warrants of the commissioners, replied he would, provided he had the funds appropriated to their payment.

The treasurer further deposed, that the fourth warrant, which was for $4000, issued the 1st of June, was discharged by several partial payments, viz: 1000 on the 17th February, 1826; 1500 on the 4th of May; 1000 on the 5th of June, and 1700 on the 20th of June. The 7th of 1500 dollars, issued on the 20th of October, 1826, was not paid till the 29th of June following; the 8th of 1500, issued the 16th of October, 1826, was not paid till the 12th of March, 1827.

Arceuil, deposes that, at the end of 1825 and in the beginning of 1826, he presented a number of the commissioners' warrants to the treasurer, on behalf of the contractor. A few of them were punctually paid; another was paid in part, at different delays; and the payment of the rest was so long withheld, that the contractor authorised the deponent to dispose of them at a heavy discount; but this could not be effected, so that the contractor issued

his own note to pay for the materials he had bought for the state-house.

From the evidence before us, it results, that the contractor, at the inception, had delayed the completion of the work he had engaged to perform, about four months and a half.

That the state had become indebted to him, and he had received cash and warrants for 20,250 dollars, 8050 of which had been punctually paid; and that in the payment of the remaining 12,200 dollars, he had been delayed for an averaged period of some three to six months, (one-third of the time he had taken to complete the work.) The warrant of 4000 dollars having been delayed six months; that of 5200 from eight to twelve months; and the two last, for 3000, six months; during which, more than one half of the funds he was entitled to receive, were kept back.

It is urged that the contract spoke of payments to be made in cash, and others in warrants on the treasury; and the contractor, as to the warrants, took his chance in regard to the state of the treasury. To this it is replied that the cash payments were only 900 dollars, or four per cent. on the price; that the payments stipulated for during the progress of the

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work, were evidently intended to enable the contractor to procure materials and pay his hands; and on stipulating that warrants on the state treasury should be delivered him, he must be understood to have stipulated that such warrants must be paid.

The commissioners have at least manifested their zeal for the interest of the state. Ours is the more august function of displaying her justice, and extending her protection to the humblest individual prosecuted by her officers, when their zeal leads them beyond the bounds of moderation.

We think the contractor has clearly shown that his activity has been checked, and his progress arrested, by the detention of the means he had calculated upon for the performance of his contract. In such a case the law is, that as the creditor has, by his own failure, prevented the debtor from complying with his engagement, the penalty is not recoverable *ff. l.* 45. 122, *s.* 3; *Hulot*, 52; 9 *Merlin's repertory*, 228, 229 *Yerby; Peine contractuelle.*— If any improper delay should thereafter occur in the completion of the work, the defendant, tho' free from the penalty, will be responsible for the damages.

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It is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided and reversed; and that there be for the defendant.

Porter for the appellees—*Moreau* for the appellant.

KERNION vs. *GUENON.*

The plaintiff cannot be non suited against his will. A trespasser cannot allege that the plaintiff has no title in the land.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The plaintiff states himself to be the owner of a tract of land on which various trespasses have been committed by the defendant. The general issue was pleaded, and the title of the petitioner denied.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

The first question is presented by a bill of exceptions. The defendant moved to nonsuit the plaintiff, because he failed to procure a legal title to the land; but the court refused to do so, and, in our opinion, correctly. A party has a right to a jury; and where he is willing

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to take his chance of a verdict, the court cannot nonsuit him.

An objection has been made to the plaintiff's title because the act under which he claims the land is a private instrument, without a price, or which is the same thing, without a serious price, the consideration expressed in it being *one dollar*. But this objection cannot be received on the part of a trespasser. The nullity set up is not absolute, but relative, and no one can take advantage of it but the vendor or his heirs.

On the merits, we think the evidence supports the verdict of the jury; and it is therefore ordered, adjudged, and decreed, that the judgment of the court below be affirmed, with costs.

Derbigny for the appellant.—*Carvillier* for the appellee.

POWELL vs. *CHAPPELL.*

A register of the land office cannot be compelled by a writ of mandamus, in a suit to which he is not a party, to grant a certificate.

APPEAL from the court of the eighth district.

MARTIN, J. delivered the opinion of the court. The plaintiff claimed a tract of land in the possession of the defendant. The general issue was pleaded.

The plaintiff prayed for a mandamus to the register and receiver of the land office of the United States at St. Helena court house, directing them to grant him a certificate of confirmation of the land sued for. The mandamus was refused, and he appealed.

It appears the mandamus was prayed for in the appellant's affidavit; that the certificate was necessary to him in the prosecution of his suit; that he had applied for it, and it had been refused; and he was legally entitled to it.

Admitting the right of the appellant to the certificate, the consequent obligation of the register and receiver to grant it, and the authority of the district court to interpose in favour of the appellant against them, he must seek his remedy in a distinct suit against them, at their domicil; and if we are to be called upon to express an opinion against or in favour of either, it must be in a suit in which they are a party.

Any court may compel the production of evidence in the possession of any person not a party to the suit, by the delivery of a copy as the production of an original paper; but where the evidence is to be exacted, which the party from whom it is required contends he is not

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bound to grant, the right of the applicant must be acted on contradictorily, with the person who refuses, but not incidentally as a suit in which he has no interest, and in a distant parish, to suit the convenience of the appellant.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed, with costs.

Ripley and *Conrad* for the appellants—*Hennen* for the appellee.

RANDOLPH vs. DAUNOY.

The existence of a servitude must be truly proven.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petition states that the defendant's land, contiguous to the plaintiff's, is burdened with a servitude whereby the water that falls on the latter has its way thro' the former, and the defendant has stopped up the passage of the water through her lot, to the injury of the plaintiff. It concludes with a prayer that she be enjoined from preventing or obstructing the passage of the water from the plaintiff's lot thro' hers, &c.

The existence of the servitude was denied;

the defendant had judgment, and the plaintiff appealed.

The statement of facts shews that the vendor of both parties built two houses in a block, which covered the whole lot on which they stand, so that the water which falls into the yard of the upper house, purchased by the plaintiff, can have no passage but over the yard of the house purchased by the defendant, or by a gutter to be made thro' the corridor or entry of the former house. There is now, and there has been for some time, a hole of the size of a hat, in the wall which separates both yards, through which the water passes from the plaintiff's yard into that of the defendant. It is not proven that this hole was left in the wall when it was erected, tho' one witness deposed he believed it was; but two others depose it has the appearance of having been made, by taking out a few bricks from the wall. It existed while the two houses belonged to the vendor of the parties, and he had noticed it. It was at times closed by the tenant of the lower house; but when she was requested to leave it open to avoid an inconvenience to the owner, she consented. It would cost about fifty dollars to have a gutter

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made thro' the entry or passage, to lead the water from the yard to the street.

On the facts, we think the district judge did not err in concluding that the plaintiff had failed to establish the existence of the servitude. It is not proven that the hole was left in the wall; and the witness who expresses his belief that it was, speaks only from the appearance of the bricks. Two others think differently.

The servitude not being proven, we think judgment was properly given for the defendant.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

Maybin for the appellant.—*P. Derbigny* for the appellee.